Petition

81-1047

No.

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL SHER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a "check kiting" scheme comes within the reach of 18 U.S.C. 1014.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL SHER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-3a) is reported at 657 F.2d 28. The opinion of the district court (App. D, *infra*, 10a-17a) is reported at 505 F. Supp. 858.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 4a) was entered on August 14, 1981. On October 6, 1981, the court of appeals denied a petition for rehearing (App. C, *infra*, 5a-9a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1014 provides, in pertinent part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of * * * any bank the deposits of which are insured by the Federal Deposit Insurance Corporation * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same * * * shall be fined not more than $5,000 or imprisonment not more than two years, or both.

STATEMENT

1. On September 18, 1980, a grand jury returned a 49-count indictment charging Michael Sher with willfully overvaluing various securities, namely worthless checks, presented by him to a federally insured bank in Pittsburgh. The indictment charged that he had presented the checks to the bank for the purpose of influencing the bank's action in advancing money and extending credit to him.

The charges stemmed from Sher's alleged "check kiting" activities between January 4, 1979 and April 16, 1979. During this period, the government claimed that Sher alternatively deposited worthless checks drawn on two bank accounts, one in Pittsburgh and one in Philadelphia, into two banking institutions in those cities. By obtaining credit for each of the worthless checks immediately upon deposit, and by taking advantage of the time lag necessary to present the checks for payment, Sher was able to obtain personal use of substantial sums of money.

The indictment charged that the scheme operated in the following manner. Sher would deposit a check drawn on the Pittsburgh account with the Philadelphia bank. The Pittsburgh account contained insufficient funds to pay the check, but before it was presented for payment Sher would "cover" the check by depositing with the Pittsburgh bank a check drawn on the Philadelphia account. The Philadelphia account, which was likewise insufficient to pay the check drawn on it, was similarly "covered" by another check again drawn on the Pittsburgh account. Sher managed to keep his "kite" afloat for four months. During this period, more than $1,800,000 in worthless checks were deposited into each account.

2. The district court granted Sher's motion to dismiss the indictment on the ground that 18 U.S.C. 1014 did not proscribe check kiting. App. D, *infra*. A panel of the Third Circuit affirmed the district court in a brief, two paragraph per curiam opinion (App. A, *infra*) that specifically noted that its decision conflicted with the Fifth Circuit opinion in *United States* v. *Payne*, 602 F.2d 1215 (1979), cert. denied, 445 U.S. 903 (1980). The appeals court denied a rehearing petition on October 6, 1981, with four judges dissenting. App. C, *infra*.

REASONS FOR GRANTING THE PETITION

This case presents an identical issue to that raised in *Williams* v. *United States*, cert. granted, No. 80-2116 (Nov. 9, 1981): whether or not 18 U.S.C. 1014 reaches check kiting schemes. Since this Court has already undertaken to resolve the issue in *Williams*, it would appear appropriate to hold the present case pending that decision.

CONCLUSION

The petition should be held for disposition as appropriate in light of this Court's decision in *Williams* v. *United States*.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1317

UNITED STATES OF AMERICA, APPELLANT

v.

SHER, MICHAEL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 80-00147)

Submitted Under Third Circuit Rule 12(6)
August 5, 1981

Before: ALDISERT and WEIS, *Circuit Judges*, and RE, *Chief Judge.**

(Filed August 14, 1981)

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* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

OPINION OF THE COURT

Per Curiam.

Michael Sher was indicted by a grand jury in the Western District of Pennsylvania for a violation of 18 U.S.C. § 1014.[1] The indictment charged Sher with conducting a "check-kiting" scheme by depositing worthless checks in two different banks, alternatively covering each check with another worthless check drawn on his account in the other bank and taking advantage of the time lag necessary for clearance to "keep the kite afloat." Sher moved before trial to dismiss the indictment, arguing that § 1014 does not prohibit the conduct alleged. The district court agreed and granted the motion to dismiss. *United States* v. *Sher*, 505 F.Supp. 858 (W.D.Pa. 1981). The United States appeals pursuant to 18 U.S.C. § 3731.

---

[1] The statute reads in pertinent part as follows:

> § 1014. Loan and credit applications generally; renewals and discounts; crop insurance
>
> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

We have carefully considered the arguments pre sented by the appellant,[2] and we are in agreement with Judge McCune's thoughtful opinion for the court below. See also *United States* v. *Pavlick*, 507 F.Supp. 359 (M.D.Pa. 1980). Accordingly, the judgment will be affirmed.

A True Copy:

Teste:

Clerk for the United States
Court of Appeals
for the Third Circuit

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[2] We have also considered but we do not accept the reasoning of the Court of Appeals for the Fifth Circuit in *United States* v. *Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1317

UNITED STATES OF AMERICA, APPELLANT

v.

SHER, MICHAEL

(D. C. Criminal No. 80-00147)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT and WEIS, *Circuit Judges* and RE, *Chief Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) August 5, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered January 9, 1981, be, and the same is hereby affirmed.

ATTEST:

/s/ Sally Mirvas
Clerk

August 14, 1981

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* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1317

UNITED STATES OF AMERICA, APPELLANT

v.

SHER, MICHAEL

(W.D. Pa. Crim. No. 80-00147)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*,
and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS,
GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*
and RE, *Chief Judge**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Adams, Hunter, Garth and Sloviter would grant the petition for rehearing.

BY THE COURT,

/s/ ALDISERT
Judge

Dated: October 6, 1981

* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

Judge Adams votes for rehearing and in support thereof makes the following statement:

On September 18, 1980, a grand jury returned a 49-count indictment charging Michael Sher with willfully overvaluing various securities, namely worthless checks, that he presented to a bank in Pittsburgh. The indictment charged that he had presented the checks to the bank for the purpose of influencing the bank's action in advancing money and extending credit to him. The charges against Sher stemmed from a check-kiting scheme he had engineered between January 4, 1979, and April 16, 1979. The government explained the factual basis for the charges as follows: Sher owned and operated a company in Pittsburgh for which he opened an account with the Equibank of Pittsburgh. He subsequently expanded his business to Philadelphia and opened an account for the company at the Philadelphia National Bank. Between January, 1979, and April, 1979, Sher took checks drawn on the Pittsburgh account and deposited them into the Philadelphia account, and vice versa. He obtained immediate credit in each bank even though there were insufficient funds in either account to cover the checks. By covering worthless checks written on one account with worthless checks written on the other account and taking advantage of the time lag necessary for clearance, Sher was able to keep the kite afloat. During the four-month period, more than $1,800,000 in worthless checks were deposited into each account.

The district court granted Sher's motion to dismiss the indictment on the ground that the indictment did not state facts sufficient to constitute a violation of 18 U.S.C. § 1014 because Section 1014 does not specifically proscribe check kiting. A panel of this Court

affirmed. Although the panel acknowledged that its decision was in conflict with the decision of the Fifth Circuit in *United States* v. *Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), it declined to accept the reasoning of that court and instead affirmed on the basis of the district court's opinion.

18 U.S.C. § 1014 reads, in pertinent part, as follows:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property, or security, for the purpose of influencing in any way the action . . . of any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, commitment, or loan, or any change or extension of any of the same . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Section 1014 is an important part of the statutory scheme that protects federally insured institutions against financial fraud. The statute is written broadly, and, as this Court noted recently in *United States* v. *Pinto*, 646 F.2d 833, 838 (3d cir. 1981), the statute "was intended to maintain the vitality of the FDIC insurance program . . . and to 'cover all undertakings which might subject the FDIC insured bank to risk of loss' " (quoting *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978). Although most convictions under Section 1014 involve false representations made on loan applications, in *Pinto* we noted that the language and the purposes of the statute extend beyond that context.

A check writing scheme such as the one charged in this case contains precisely he same dangers to fed-

erally insured institutions as a scheme involving false representations on loan applications: the check kiting scheme involves representations that the checks presented for deposit are supported by adequate funds; the representations are false; and they result in the advance of credit by the bank that honors the checks. As we held in *Pinto*, an extension of credit or an "advance" is a transaction falling within Section 1014, and the statute should not be read more restrictively than its language would permit.

The only other court of appeals to discuss this issue is the Fifth Circuit. That court has squarely held that a check kiting scheme falls within the reach of Section 1014. *United States* v. *Payne*, 602 F.2d 1215, 1216 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). In *Payne*, the Fifth Circuit held that a check is a "security" within the meaning of Section 1014, and that a check that is not supported by sufficient funds on deposit is "overvalued" within the meaning of the statute. Although Section 1014 does not contain a definition of "security," that term is specifically defined in 18 U.S.C. § 2311 to include "any . . . check." Likewise, a government check has been defined as a "security" under 18 U.S.C. § 3056. *See Rogers* v. *United States*, 330 F.2d 535, 539 (5th Cir.), *cert. denied*, 379 U.S. 916 (1964). There would appear to be no reason to give the term a more limited interpretation in Section 1014. Moreover, a kited check is "overvalued" because it is represented to be worth its face value, when in fact it is worthless, because it is not supported by funds on deposit in the account on which the check is drawn. Therefore, as *Payne* held, a check kiting scheme falls within the general purposes of the statute—to protect federally insured institutions from fraudulent

schemes designed to obtain advances and extensions of credit—and it would appear to satisfy the plain language of the statute. Absent any clear indication in the legislative history that check kiting schemes were *not* intended to be covered by Section 1014, there would appear to be no basis for reading the Section restrictively so as to eliminate such schemes from coverage. See *United States* v. *Turkette*, 101 S.Ct. 2524, 2527 (1981); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Because the panel opinion in this case conflicts with the approach to Section 1014 taken in a recent decision by this Court (*United States* v. *Pinto*, *supra*); because it conflicts with the position taken by another circuit (*United States* v. *Payne*); and because it involves a significant interpretation of an important federal criminal statute, I believe the Court should rehear the case in banc.

Judge Garth also votes for rehearing and joins in this statement. Judges Hunter and Sloviter likewise would vote for rehearing in banc.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals
for the Third Circuit

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISRICT OF
PENNSYLVANIA

Criminal Action No. 80-147

UNITED STATES OF AMERICA

vs.

MICHAEL SHER

MEMORANDUM

BARRON P. McCUNE, District Judge

January 9th, 1981.

We consider defendant's motion to dismiss the indictment against him, on the ground that the statute which he is accused of violating does not proscribe his alleged conduct. Briefs have been filed and the motion is ready for adjudication.

The defendant was charged in a 49-count indictment with participating in a check-kiting scheme which defrauded a bank insured by the Federal Deposit Insurance Corporation of over $1,855,000.00, in violation of 18 U.S.C. §§ 1014 and 2. The Government alleges that on or about August 29, 1978, the defendant opened a checking account at Equibank in Pittsburgh in the name of M.S. Insurance Replacement, Inc., which defendant owned and operated. A few months later, defendant expanded his business to the Philadelphia area, and on January 4, 1979, opened a checking account at Philadelphia National Bank, also in the name of M.S. Insurance Replacement, Inc. Both banks granted defendant immediate credit on all deposits made.

The indictment charges that the check kiting scheme operated between January 11, 1979, and April 12, 1979. The Government alleges that defendant took checks payable to M.S. Insurance Replacement, Inc., drawn on the account of M.S. Insurance Replacement, Inc., at the Philadelphia bank, and deposited them in the Equibank office in Pittsburgh. At about the same time, defendant had checks for the same amount, drawn on his corporation's account in Pittsburgh and made payable to his corporation, deposited in the Philadelphia bank. The Government says that defendant obtained immediate credit for the amounts of the checks even though there were insufficient funds in the checking accounts. By covering worthless checks written on one account with worthless checks written on another account and taking advantage of the time lag necessary for clearance, *see United States* v. *Lea*, 618 F.2d 426, 430 n.4 (7th Cir. 1980), *North Carolina National Bank* v. *South Carolina National Bank*, 449 F. Supp. 616, 617 n.3 (D. S.C. 1976), the Government alleges that defendant was able to keep the kite aloft.

The defendant has filed a motion to dismiss the indictment. He contends that § 1014 of Title 18 of the United States Code does not include check-kiting within its proscription. He therefore argues that he cannot be prosecuted under § 1014.

Section 1014 reads, in relevant part, as follows:

> "Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, . . . upon any application, advance, discount, purchase, pur-

> chase agreement, repurchase agreement, commitment, or loan, . . . shall be fined not more than $5000 or imprisoned not more than two years, or both." [1]

This section is a consolidation of 13 predecessor sections containing similar provisions relating to false statements and representations or overvaluations of security. The terms "application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan" were added to represent a composite of the terms and transactions mentioned in the 13 predecessor sections.

Section 1014 does not explicitly mention checks, and there is nothing in the brief legislative history of the statute indicating whether a check-kiting scheme is contemplated by its terms. Two opinions address this question, but they contradict one another.

United States v. *Edwards*, 455 F. Supp. 1354 (M.D. Pa. 1978), holds that § 1014 does not proscribe check-kiting. The district court based its holding on the fact that presenting a check is not a "statement" which can be rendered false by the fact that the drawer of the check does not possess sufficient funds to cover it. *Id.* at 1356. Rather, it is an order to the drawee bank to pay the check according to its terms, with the drawer promising to pay a sum certain. If a check is no more than a promise to pay, the court observed, then it can be neither true nor false. *Id.* at 1356-57.

Second, the court in *Edwards* doubted that presenting a check for deposit is an "application, advance,

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[1] The indictment alleges that Equibank's deposits were insured by the Federal Deposit Insurance Corporation at the time the alleged check-kiting scheme occurred.

discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." It did not believe that the corporations and entities originally enumerated in § 1014 ever engaged in the sort of banking practices performed by Federal Savings and Loan Insurance Corporation and Federal Deposit Insurance Corporation banks, which were added to § 1014 in 1970. *Id.* at 1357-58. The court also questioned whether the withdrawal of funds from a checking account prior to the payment of deposited checks constituted an "advance" of money. *Id.* at 1358.

Finally, the court believed that § 1014 was ambiguous with respect to whether it included check-kiting schemes, absent any evidence of statements made by a defendant concerning his ability to cover the checks. *Id.* at 1356. The court said that if Congress had intended to outlaw the passing of worthless checks, it could easily have done so in terms more certain than those found in § 1014. *Id.* at 1357.

The second case, *United States* v. *Payne*, 602 F.2d 1215, (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), however, holds that § 1014 does encompass check-kiting. In so holding, the Court of Appeals for the Fifth Circuit criticized the reasoning of *Edwards*. It disagreed with the *Edwards* court's premise that the presentation of a check is not a statement, but rather an order to pay, finding this to be an oversimplified view of the transaction. In actuality, the Court of Appeals said, a check is an implied representation by the drawer that he has on deposit with the drawee bank, funds equivalent to the face amount of the check. *Id.* at 1218, *quoting* F. Whitney, *The Law of Modern Commercial Practices*, § 341 (1965). From this, it followed that "the necessary implications which a check carries . . . are the legal equiva-

lent of a representation or statement as to the value of the checks." *Id.* at 1218.

The Court of Appeals cleared other statutory language hurdles which the *Edwards* court said precluded prosecution for check-kiting under § 1014. It looked to the Uniform Commercial Code and other federal criminal statutes and concluded that a check is a "security" within the meaning of § 1014. *Id.* Hence, the presentation of a worthless check could stand for the overvaluation of a security as well. Furthermore, the court found this presentation to be "for the purpose of influencing in any way the action . . . of any bank . . . upon any evidence . . . or loan." It cited many cases characterizing a bank's act in extending credit to a customer before the check clears, or permitting him to draw against an uncollected item, as a transaction in the nature of a loan. This, the court said, is the essence of check-kiting. *Id.* Therefore, § 1014 could properly be interpreted to cover check-kiting.

The Fifth Circuit also found support for its holding in the legislative history. Section 1014, as mentioned earlier, represents a consolidation of 13 other sections with similar provisions, which occurred in 1948. The court observed that most of these sections involved federal agencies making loans for farming or home construction, but two did not: those protecting Federal Reserve banks and the Reconstruction Finance Corporation. *Id.* at 1219. From 1949 through 1970, other entities were added, the most notable being the Federal Deposit Insurance Corporation, FDIC-insured banks, the Federal Savings and Loan Insurance Corporation, FSLIC-insured institutions, members of the Home Loan Bank System, and the Administrator for the National Credit Union Administration.

The court noted that

> "[t]hus, by 1970 the codified section was not devoted exclusively to criminal coverage for false applications in the farming and home construction field. . . .
>
> This development leads us to the inference, contrary to the court's conclusions in *Edwards*, that the intent of Congress was to incorporate in one codal section all of the business transactions of any of the specified agencies. The statute therefore proscribes not only fraudulent statements given in connection with farm or construction loan [*sic*] but 'all undertaking[s] which might subject the FDIC insured bank to risk of loss.' *United States* v. *Stoddart*, 10 Cir. 1978, 574 F.2d 1050, 1053."

Id.

The Third Circuit has not yet considered the question before us. We therefore may look to cases from other jurisdictions for guidance.

The logic of the Fifth Circuit's analysis of § 1014 in *Payne* is certainly persuasive, but we cannot ignore § 1014's bare language, which is ambiguous with respect to the cashing of checks. Criminal statutes are to be strictly construed, and ambiguities resolved in the defendant's favor. *United States* v. *Ortega*, 517 F.2d 1006, 1009 (3d Cir. 1975). We agree with the *Edwards* court that if Congress had intended to protect the institutions enumerated in § 1014 from check-kiting schemes, it would have done so explicitly.

Of course, the rule that ambiguity should be resolved in favor of lenity is not to be used in complete disregard of the purpose of the legislature.

Scarborough v. *United States*, 431 U.S. 563, 577 (1977). But the legislative history of § 1014 is scant, and we find nothing in it indicating that § 1014 was meant to include check-kiting in its prohibition. For example, the conference report accompanying the legislation which added FDIC-insured institutions and credit unions insured by the National Credit Union Share Insurance Fund to § 1014's protection states:

> "The House bill contained a provision not in the Senate amendment providing criminal penalties for making false statements or reports *in connection with loans or other similar transactions involving an insured savings and loan association.* The conference substitute contains the House provision with an amendment applying the same penalties to financial institutions insured by the Federal Deposit Insurance Corporation and credit unions insured by the National Credit Union Share Insurance Fund."

Conf. Rep. No. 91-1784, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5582, 5683-84 (emphasis added).

Similarly the legislative history of the 1964 amendment of § 1014, adding federal credit unions, states that the amendment

> "would make it an offense under the United States Criminal Code for anyone knowingly to make a false statement or report or willfully overvalue any land, property. or security to influence the action of a Federal credit union in connection with any application, loan, *or the like.*"

S. Rep. No. 1078, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News 2519, 2520 (emphasis added).

The strongest evidence that § 1014 does not cover transactions outside of the borrowing and lending context appears at *id* at 2522:

> "Section 1014 is designed primarily to apply to borrowers from Federal agencies or federally chartered organizations. It is not, however, limited by its terms to borrowers and would seem also to apply to others, including for example, officers and employees of the agencies and institutions named."

We conclude from the above that there is no expressed Congressional intent to include check-kiting as criminal activity under § 1014. As we said, the *Payne* court's reasoning is persuasive. But we believe that when the Government's interpretation of a criminal statute is not readily ascertainable from a reading of the statute, it is the better course not to broaden its application beyond that which its context signifies.

We therefore grant the defendant's motion to dismiss the indictment.

An order follows.

/s/ Barron P. McCune
BARRON P. MCCUNE
United States District Judge

Dated: January 9th, 1981.

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

Criminal Action No. 80-147

UNITED STATES OF AMERICA

vs.

MICHAEL SHER

ORDER

AND NOW, January 9th, 1981, the Motion to Dismiss the Indictment is granted.

/s/ Barron P. McCune
BARRON P. MCCUNE
United States District Judge

cc: Edward J. Schwabenland, A.U.S.A.
United States Courthouse
Pittsburgh, Pa. 15219

Michael W. Zurat, Esq.
610 Lawyers Building
Pittsburgh, Pa. 15219

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Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1047

MICHAEL SHER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

REPLY TO PETITION FOR WRIT OF CERTIORARI
FOR UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

REPLY OF RESPONDENT IN OPPOSITION

MICHAEL W. ZURAT, Esquire
Zurat, Profeta & Christin
Suite 600 Lawyers Building
Pittsburgh, Pennsylvania 15219

(412)391-3511

TABLE OF CITATIONS

WILLIAMS v. UNITED STATES, cert., granted, No. 80-2116 (Nov.9, 1981)

STATEMENT OF THE CASE

Respondent submits no further facts in supplement to the statement of the case provided by Petitioner.

REASONS FOR DENYING THE PETITION

The Petitioner in the instant action relies upon the Court's granting of certiorari in the case of Williams v. United Stat , cert., granted, No. 80-2116 (November 9, 1981) to justify holding this action pending that decision. The Respondent, Michael Sher is not knowledgeable of the arguments and issues presented during the Williams proceedings. No further substantive issues were raised by the Petitioner in the current petition.

Because no substantive issues have been presented as reasons for granting the petition, Respondent lacks the catalyst or framework with which to formulate a precise reply. The Petition of the United States does include the opinions of the United States Court of Appeals for the Third Circuit and the Western District Court of Pennsylvania. Those enclosed opinions fairly represent the position held by the Respondent in arguments presented to those respective courts and such opinions are hereby incorporated today in Respondent's Reasons for Denying the Petition.

If Certiorari is granted in this instant action, however, the Respondent respectfully requests an opportunity to argue the substantive issues at some stage of the proceedings. The Respondent is willing, if necessary, to conduct such argument in conjunction with the Williams case. The Respondent believes his prior arguments have aided the lower courts in reaching their conclusions and that extensive prior research on Respondent's part has resulted in unique and commanding insights into the issue at hand.

CONCLUSION

In Conclusion, Respondent respectfully requests that the instant Petition be denied.

Respectfully Submitted,

Zurat, Profeta & Christin

By: Michael W. Zurat

MICHAEL W. ZURAT, Esquire

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1047

MICHAEL SHER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

REPLY TO PETITION FOR WRIT OF CERTIORARI
FOR UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

MICHAEL W. ZURAT, Esquire
Zurat, Profeta & Christin
Suite 600 Lawyers Building
Pittsburgh, Pa. 15219

(412)391-3511

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981
No. 81-1047

MICHAEL SHER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

MICHAEL SHER, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 53 of the rules of this Court. The affidavit of MICHAEL SHER, in support of this motion is hereto attached.

Presented herewith is a petition for Writ of Certiorari of moving party.

Dated March 3, 1982.

Respectfully Submitted,

MICHAEL W. ZURAT, Esquire
Zurat, Profeta & Christin
Suite 600 Lawyers Building
Pittsburgh, Pa. 15219

Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981
No. 81-1047

MICHAEL SHER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

MICHAEL SHER, being duly sworn on oath deposes and says:

1. He is the Respondent in the above entitled action and makes this Affidavit in support of his motion for Leave To Proceed In Forma Pauperis herein.

2. Respondent is unable because of his poverty to pay fees and costs of this case or give security therefor.

MICHAEL SHER

Sworn to and Subscribed

Before me this 22D day

of MARCH, 1982.

Notary Public

DONNA L. SCHMAL, Notary Public
Pittsburgh, Allegheny County, Pa.
My Commission Expires Sept. 5, 1983

PROOF OF SERVICE

I, MICHAEL W. ZURAT, Esquire, do hereby certify that a true and correct copy of the Reply of Respondent In Opposition and also the Motion For Leave To Proceed In Forma Pauperis was served upon the following parties on the 24 day of March, 1982, via Regular Mail:

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543
Attention: Alexander L. Stevas, Clerk

Rex E. Lee, Solicitor General
Department of Justice
Washington, D.C. 20530

END OF DOCKET